Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of	)	
the Cable Communications Policy Act of	)	MB Docket No. 05-311
1984 as amended by the Cable	)	
Television Consumer Protection and	)	
Competition Act of 1992	)	
	)	
	)	

To the Commission:

COMMENTS OF THE
UNITED STATES INTERNET
INDUSTRY ASSOCIATION ("USIIA")

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Introduction and Summary

The US Internet Industry Association ("USIIA") submits these comments with regard to the Notice of Proposed Rulemaking opened by the Commission on November 18, 2005, regarding implementation of Section 621(a)(1) of the Communications Act of 1934, as amended.

Section 621(a)(1) of the Act states in relevant part that "a franchising authority … may not unreasonably refuse to award an additional competitive franchise."[1] Clearly intended to stimulate competition among video service providers, the amended law also prohibits any Local Franchising Authority (LFA) from unreasonably impeding the award of such franchise.

The Commission seeks input into whether the franchising process unreasonably impedes the achievement of the federal goal of accelerated broadband deployment and, if so, how the Commission should act to address that problem.

USIIA submits that the Commission has correctly identified and proposes to remediate a significant impediment to the national goal of ubiquitous broadband deployments. Specifically, USIIA submits that:

- There no longer exist "cable television" companies that are separate and distinct from other broadband companies – the differences have been subsumed by the emergence of broadband, under which all of the competitors strive to deliver to customers nearly identical sets of Internet, telephony, and video services.

- The local franchising process, by its very existence, does unreasonably impede the deployment of broadband.

[1] 47 U.S.C. § 541(a)(1).

- The removal or reform of this impediment will serve the interests of consumers and their communities by promoting investment in the broadband infrastructure, enhancing competition among broadband services and streamlining the processes for community access and support from franchisees.

- The Commission has and should exercise the authority to replace LFA procedures and agreements with a national franchising authority under the auspices of the Commission, in such a manner that does not impede the right of the LFA regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title.

- In creating such an authority, legacy requirements for new entrants act as an entry barrier and should be rejected in favor of other, more focused community support programs

Statement of Standing

USIIA is a national trade association of competitive companies engaged in Internet commerce, content and connectivity. Its members constitute a broad cross-section of the Internet industry, providing consensus on policy issues that breach the competitive interests of any single member or segment of the industry.

USIIA reaches its public policy positions through a process of consensus that is directed by a Board of Directors elected annually by the members of the Association. Those positions are based on the best interests of the majority of members and of the industry as a whole. These positions are not subject to the whim of any single segment of the industry, and are not affected by financial arrangements, marketing agreements or other external forces.

As the appointed representative of its members charged with advancing their economic interests and assisting in achieving and maintaining their legal and competitive parity, and to continue to advocate for the expansion of broadband networks, USIIA has standing to file these comments.

Statements and Conclusions

The US Internet Industry Association believes that a coherent national policy must be created in order to deal as rapidly as possible with the competitive issues related to franchising of broadband services. It is the Commission's charge to develop this national policy and not leave the future investment in broadband networks to a patchwork of tens of thousands of franchising authorities. Specifically, the Association submits that:

1. <u>There no longer exists a "cable television" industry that is separate and distinct from other broadband companies – the differences have been subsumed by the emergence of broadband, under which all of the competitors strive to deliver to customers nearly identical sets of Internet, telephony, and video services.</u> With the advent of Voice over Internet Protocol telephony and its emergence as a major broadband service early in the 21^{st} Century, it has become virtually impossible to differentiate between the products offered by cable, telephone, wireless, satellite and other broadband platforms. This melding of platforms has been further exacerbated by the introduction of video television and motion picture capabilities for cell phones and technologies that enable the transmission of "cable" signals for viewing on personal computers and mobile devices or their retransmission over the Internet.

   What were formally "cable television" companies are now broadband services, and more specifically Network Service Providers (NSPs). This is particularly the case given the marketing agreements between the former cable companies and independent ISPs such as America Online and Earthlink. Nor is the cable industry alone in this evolution – it can and has been argued that the difference between voice and data telephony is rendered moot, and that the telephony industry likewise no longer exits in its traditional forms.

Just as the Commission has determined that it is unwarranted to subject the broadband services industry to the restrictive and often deleterious regulatory regimes of the former telephone industry, it makes little sense to subject it to the arcane requirements of the former cable industry – specifically the balkanization of control under a Local Franchising Authority arrangement and the difficulty of engaging in franchising agreements in more than 40,000 local cities and political subdivisions. That process, which was developed more than 30 years ago, served its purpose to bring customers greater selection of television programming, but it was created for an era when no competitive video providers existed. Now the process merely delays new investment in broadband networks.

2. The local franchising process, by its very existence, does unreasonably impede the deployment of broadband. The Commission itself found in its first annual report on video competition in 1994, "[t]he local franchise process is, perhaps, the most important policy-relevant barrier to competitive entry in local cable markets."[2]

Broadband companies seeking to enter the video markets must contend with a process that requires a year or more of work by a team of lawyers, engineers and managers to weave through the processes of application, review, negotiation, and approvals. This process can take more than a year to complete even without deliberate delays or inherent inertia.

If the companies seeking competitive entry to those markets were able to complete one franchise agreement per week – an aggressive schedule, given the legal documentation required and the requisite negotiations with each

[2] Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 9 FCC Rcd 7442, Appendix H at ¶ 43 (1994) ("First Video Competition Report").

city government – it would take nearly 100 years for new investment in broadband to become deployed in the United States. This is based on an approximate 40,000 cities in the US, with eight competitive broadband companies (four "Baby Bell" competitors and up to four other or overbuilder competitors), each obtaining one franchise per week. This would fall far short of the Bush Administration's goal to reach ubiquitous broadband nationwide by 2007.

And the expense required in negotiating these 40,000 or more franchise agreements will add substantial cost to investment in the buildout of broadband networks without adding a single subscriber. That is to say, dollars that could and should go toward the goal of building a national broadband infrastructure will instead be spent on a relatively meaningless process of local franchises.

It is no longer a question of whether cities themselves erect unreasonable barriers to entry. The reality is that the process of local franchising in and of itself renders timely deployment of broadband services impossible. The Commission must, at a minimum, streamline the process and establish a reasonable time period for the award of a franchise. The recent success in Texas suggests that its process may serve as a reasonable template.[3]

3. <u>The removal of this impediment will serve the interests of consumers and their communities by promoting investment in the buildout of broadband infrastructure, enhancing competition among broadband services and streamlining the processes for community access and support from franchisees.</u> Clearly, it is not in the vested interests of the cities or the incumbent cable companies to eliminate Local Franchising Authorities in favor of state or national authorities; yet this would best serve the interests of all parties involved over the long term.

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[3] Tex. Util. Code Ann. Sec. 66.003(b). It requires that the Texas Utility Commission issue a certificate of franchise authority before the 17th day after receipt.

The elimination of LFAs would remove the immediate impediment to new entrants into the markets for broadband services, especially fiber optic overbuilders and telephony-based providers. This would also benefit consumers, who may expect greater choice, lower prices and expanded services. The Government Accountability Office found that wireline cable competition exists in less than 2 percent of all communities, but that in those areas, cable prices average approximately 15 percent lower than in non-competitive areas, while customer service improves.[4] The Commission itself reached a similar conclusion in its study of cable markets, noting that "[f]or communities [with wireline overbuild competition], the monthly cable rate and price per channel were, respectively, 15.7 percent lower and 27.2 percent lower than those averages for the noncompetitive group."[5]

The local franchise process was developed at a time when the cable companies brought expanded television programming to customers. They were able to meet the requests of the Local Franchise Authorities because there was no competition, and the cable companies were virtually guaranteed a revenue stream from customers. This is not the case with a new entrant in a competitive market. There is no guarantee that they will receive any revenue on the risk capital they are investing. The franchise process serves as a deterrent to new broadband investment and should be reformed. But

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[4] U.S. General Accounting Office, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry*, Testimony of Mark L. Goldstein, Director of Physical Infrastructure Issues, Before the Senate Committee on Commerce, Science and Transportation, GAO-04-262T, at 6 (Mar. 25, 2004) ("*GAO Mar. 2004 Cable Competition Report*"); U.S. General Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Senate Committee on Commerce, Science and Transportation, GAO-04-8, at 3-4 (Oct. 24, 2003) ("*GAO Oct. 2003 Cable Competition Report*").

[5] Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 2718, ¶ 12 (2005) ("*2005 Cable Pricing Report*"). The Commission has suggested that wireline competition only exists in approximately 400 if the 33,485 cable communities nationwide – or approximately 1.2 percent of communities. *See* Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, ¶ 26, App. B. at Table B-1 (2005) ("*2005 Cable Competition Report*").

the reformed local franchising will also benefit these former cable companies in the long term by freeing them from the requirement to renegotiate these contracts at regular intervals; by opening new markets to them; by easing franchise problems with mergers and acquisitions; and by encouraging further growth and innovation within those companies in order to remain competitive.

Local Franchise Authorities will likewise benefit in the long term. The original intent of the franchising agreements – to afford communities control over access to rights of way – makes little sense when competitive telephony, satellite, electrical and wireless broadband providers already have or do not need such access. Though they will lose some local control over cable video services, any state or federal franchising system can be structured to retain control over use of rights of way and to maintain revenue streams to the city. This will have the practical effect of reducing overhead costs to the city while maintaining a revenue stream. In fact, structuring the franchise system so that it covers all broadband providers could substantially enhance local revenues without a commensurate increase in costs. Satellite video providers, for example, do not pay franchise fees today but could do so under a reformed franchising system.

4. <u>The Commission has and should exercise the authority to replace LFA procedures and agreements with a national franchising authority under the auspices of the Commission.</u>

In its Franchise NPRM, the Commission concluded that it "has authority to implement Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises," and that "[u]nder the Supremacy Clause, the enforcement of a state law or regulation may be preempted by federal law when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Commission also "tentatively conclude[d] that, pursuant to the authority granted under Sections 621(a) and 636(c) of the Act, and under the Supremacy Clause, the Commission may deem to be preempted and superseded any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of section 621(a)."

It is in the best interests of consumers; local governments; and the broadband industry for the Commission to exercise this authority through the creation of a national franchising authority that supersedes the authority of local government entities and the states.

5. <u>In creating such an authority, legacy requirements for new entrants act as an entry barrier and should be rejected in favor of other, more focused community support programs.</u> In the past four decades, the franchising process has grown from a simple mechanism to manage public rights of way into a veritable bonanza of revenue streams and projects, some of which have little or nothing to do with public video services – from payment of city fees to fiber support for traffic lights.

Not only do these requirements make little sense in the age of broadband, but they would be difficult to impossible to manage for broadband platforms such as cellular, wide-scale wireless or satellite communications, which recognize no distinct community boundaries. Even telephony-based video services operate on the bases of central offices that often do not match governmental jurisdictions.

While it can be argued that Public, Educational and Government (PEG) programs have merit and deserve support – and thus are generally not opposed by new competitors seeking entry into local markets -- the Commission has the ability to more equitably assign responsibility for support of such programs in other ways, including their consideration as part of the proposed rulemaking on Universal Service for broadband.

In the same manner, buildout requirements have been rendered obsolete by technology. Satellite, wireless and cellular networks reach all neighborhoods in a community simply by their existence. Telephony video services operate on a basis that does not recognize government subdivision, via central offices that span geopolitical boundaries. To retain legacy requirements for community buildout would ignore the actual architecture of these networks in an attempt to twist them into something resembling cable architecture – without any demonstrable benefit to the community or its residents. Government mandates will not further investment. Rather it is customers that should drive the investments in a competitive marketplace. Just as the Commission did not arbitrarily force build out new entrants into the telephony, broadband, wireless, or satellite markets, it should not do so in the video marketplace.

Conclusions

The Commission has a duty to establish a national policy that furthers broadband deployment. In the past, the Commission has looked for barriers to broadband investment -- and then removed them. It has the same opportunity with respect to the markets for video services. The local franchise process is obsolete and actively serves to inhibit and discourage new entries. If the United States is to achieve its goals for the rapid deployment of broadband, it is necessary to sweep away the regulatory thinking of the past in order to ensure that neither the Commission nor the states create situations contrary to the stated goals of the United States. Local Franchising Authorities, like the excise taxes used to fund the Spanish-American War, have no place in the management of 21st Century technologies and should be replaced by a streamlined, more efficient national franchising authority.

Respectfully submitted,

US INTERNET INDUSTRY ASSOCIATION

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